IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

The Estate of JESSE D. WILLIAMS, Deceased, by and through MAYOLA WILLIAMS, Personal Representative, Plaintiff, vs. PHILIP MORRIS INCORPORATED, Defendant.	Vol. 22-A Circuit Court No. 9705-03957

A.M. PROCEEDINGS

BE IT REMEMBERED, That the above-entitled matter came on regularly for Jury Trial and was heard before the Honorable Anna J. Brown, Judge of Department No. 7C, of the Circuit Court of the County of Multnomah, State of Oregon, commencing at 9:00 a.m., Tuesday, March 23, 1999.

* * *

Reported by Jennifer L. Wiles, CSR, RPR.

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Tobacco Industry Documents Library http://tobaccodocuments.ucsf.edu/docs/jqhl0001

APPEARANCES:

James Coon, Attorney at Law,
William Gaylord, Attorney at Law,
Ray Thomas, Attorney at Law,
Christopher Tauman, Attorney at Law,
appearing on behalf of the Plaintiff;

James Dumas, Attorney at Law,
Michael Harting, Attorney at Law,
Billy Randles, Attorney at Law,
Walter Cofer, Attorney at Law,
Jay Beattie, Attorney at Law,
Pat Sirridge, Attorney at Law,
appearing on behalf of the Defendant.

* * *

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Tobacco Industry Documents Library http://industrydocuments.ucsf.edu/docs/jqhl0001

GENERAL INDEX

Tuesday March 23, 1999 4
Reporter's Certificate 99

* * *

WITNESS INDEX

REBUTTAL WITNESSES:

FOR THE Plaintiff:	Direct	Cross	Redirect
Dr. Steven Primack presented via videotape	48	(not reported)	
Dr. John Keppel, M.D.			
By Mr. Gaylord	52		93
By Mr. Sirridge		64	

* * *

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Internet Archive in 2014 http://www.industrydocuments.ucsf.edu/docs/jqhl0001

(March 23, 1999)

* * *

A.M. P R O C E E D I N G S

* * *

THE COURT: Are we ready to go on the record regarding Dr. Turco.

What I would like to do on the record about Dr. Turco is first go through the transcript that I have and rule on the various objections and then go back and reconsider the universal objection about it being cumulative and whatever else Plaintiff wants me to consider. But I think I need to first rule out that which is inadmissible before I consider the proffer as a whole.

Does that make sense to people?

MR. GAYLORD: I was going to suggest the other way because I think our position is that the whole thing is flawed which makes the smaller parts moot. Of course, we'll do whatever you would rather.

THE COURT: In order for me to make a logical ruling about whether something is or isn't admissible, I need to see it in the form that it will be proffered. Right now what has

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Internet Archive in 2014 http://www.industrydocuments.ucsf.edu/docs/jqhl0001

been handed to me has objections to both sides which needs resolution. So I would like to rule on the objections first and then go back and evaluate the proffer as a whole with maybe summary argument on both sides about it.

I noted that -- do you all have the transcript?

MR. GAYLORD: Yes.

THE COURT: Okay. I noted that essentially pages 4 through 13 were further qualifications of Dr. Turco. And then beginning on Page 13 the direct testimony turned to questions specific to Jesse Williams.

I noted on Page 23 the first objection, which, had it been made in my presence, I would have sustained. So, let's just walk through with these hypothetical rulings and then you can go back and tell me if you are concerned about them as it affects the whole, because I do believe the form of the question is argumentative.

So, I would then, with that ruling, take out from Line 9 through the end of Page 23 and the first line on Page 24.

MR. GAYLORD: Can I respond very briefly to that, Your Honor?

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Tobacco Industry Documents Library http://industrydocuments.ucsf.edu/docs/jqhl0001

THE COURT: If you would like.

MR. GAYLORD: I think what may be argumentative in general is less argumentative under these circumstances because of the claim this witness has made which was I'm just every man, totally objective, and I'm only here because they told me I could say and take whatever position I wanted to. And I think that invites a challenge because we as lawyers all know there's no way he would be invited here to testify if his opinion hadn't supported the position that the tobacco company wanted to express.

THE COURT: And that is an argument for the jury, but it's not a question for the witness. The argumentative objection is sustained.

MR. GAYLORD: May I have one last shot?

THE COURT: Of course.

MR. GAYLORD: I think his refusal to acknowledge that is an impeachment of some value. How much value, who knows. But I think it's fair to ask him don't you agree you wouldn't have been invited here if you didn't agree with their position? And when he refuses to acknowledge that, I think that is --

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

THE COURT: But it's the answer to the question that is really what the subject of your argument. He goes on to, in answer to the argumentative question, bolster his own credibility by talking about being written up as objectively in Willamette Week and so forth. It is an argumentative question. The objection is sustained, and the answer is out.

Page 25. I would overrule the objection on Line 22.

MR. DUMAS: 25.

THE COURT: Excuse me. Line 22 is where the objection is on Page 25.

Are you there?

MR. GAYLORD: Yes.

THE COURT: I would overrule that objection. And I would overrule the objection on Line 25.

Now Page 30.

MR. DUMAS: May I be heard on that, Your Honor? I thought we had a ruling in limine that we weren't going to get into the Kansas City law firm?

THE COURT: We had a ruling in limine that we weren't going to get into specific names

http://legacy.library.ucsf.edu/tid/szq07a00/pdf Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

of lawyers that were referenced in documents.

Mr. Cofer has told the jury he's from Kansas City. He did it during voir dire. He said gosh, is it Willamette? Is it this? Where is Kaiser Shipyard? I'm from Kansas City.

Everybody knows that half of the team is from Kansas City, and this question doesn't relate to a Philip Morris document or something else. It says the Kansas City law firm. They know you are a law firm. Come on, it's week five.

Okay. Page 30. We get into trouble here. Let me try to get to my notes here.

All right. The question started on Line 24, which was an attempted foundation to ask this witness about the ABA article of March 17, 1999, and there was an objection on inadequate foundation. And I agree that the foundation is not adequate for purposes of laying the -- allowing impeachment with an otherwise hearsay article.

The witness did not acknowledge that he relied on the document. He did not acknowledge that it was an authoritative.

What he said was that I'm not an expert.

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

I don't know what they did. They are the experts, but I don't know what they did, and I didn't rely on them. That is an inadequate foundation for hearsay purposes.

And the objection then would -- sustaining that objection would take out Page 30, Lines 24 and 25 and all the way over to Page 32, Lines 1 and 2.

MR. DUMAS: All the way through where?

THE COURT: Page 32, Lines 1 and 2. So all of Page 31, 32, Lines 1 and 2.

Then Page 34 there was an objection because the word profile, I think, was used in the form of Mr. Thomas's question and then it was cleared up. So, to me, it's cured.

MR. GAYLORD: It was cleared up.

THE COURT: But if you need to have that edited out to be precise, you know, I don't feel strongly about it. Does either side?

Mr. Thomas voluntarily restates the question.

MR. DUMAS: Right. I don't have a problem with the restated question. I just want the question in Line 3 stricken. That is all.

THE COURT: Okay.

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Tobacco Industry Documents Library at UCSF http://industrydocuments.ucsf.edu/docs/jqhl0001

MR. GAYLORD: I don't have a problem with them striking it.
THE COURT: Okay. Then Lines 3 through --
MR. GAYLORD: Presumably, they'll let us --
THE COURT: 3 through 11 would be out, and we would just go to the question.
MR. DUMAS: Right.
THE COURT: Okay.
Then on Page 34, that was Page 35, I have got a problem. And it's this State vs. Milbradt problem. We have got the witness testifying about the credibility eventually of Mayola Williams, and even in the face of no objection I'm required by the Oregon Supreme court precedent to interfere.
So, I have got to figure out how to edit this to delete the witness's comments about Mayola Williams' testimony being contrived and so forth, because that can't be allowed before the jury.
A trial witness cannot offer testimony about whether another trial witness is giving contrived testimony.

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Tobacco Industry Documents Library http://industrydocuments.ucsf.edu/docs/jqhl0001

So, let me suggest a way to edit around this. I would propose to strike on Page 35, beginning at Line 14, the question:

"And you don't have any reason to believe that he didn't believe that, do you?"

No. Not that question. That question would stay in because he, Jesse Williams, was not a testifying witness.

But Line 17, the question:

"And when Jesse Williams found out that he had a diagnosis of terminal cancer," that question ends up with, "you don't have any reason to disbelieve that testimony, do you?"

And then he goes on to comment that it's contrived.

So, Page 35, Line 17, I would start striking there. I would strike all of 36.

MR. DUMAS: The whole page?

THE COURT: All of 36. And then the end of that ruling is through Line 8 on Page 37.

Now we have a different objection, and this goes back to the argumentative point you were making, Mr. Gaylord, earlier, and I think this may be a cleaner place to make the point that you were trying to make earlier, because

http://legacy.library.ucsf.edu/tid/szq07a00/pdf Courtesy of http://www.industrydocuments.ucsf.edu/docs/jqhl0001

it's essentially the same question but now in a little different light.

So, I have -- this is why I want to go through the whole package and evaluate the cumulative impact of one point or another as a package since we have the luxury of doing it in hindsight.

MR. GAYLORD: I don't want to miss the chance to respond to the proposed deletion of the -- of his testimony about contrived, but I want to come back to that.

I think that is a fundamental flaw in this whole testimony. I think that is the core of his testimony. I think that is what allows him, among other things, to claim to have the expertise and the opinion he has is that he believes a witness is lying and wants to say so.

THE COURT: Well, are you -- excuse me. Are you disagreeing that his testimony that we just covered, beginning on Page 35, Line 17, through all of Page 36, and onto Page 37, through Line 8, should be stricken? Are you disagreeing?

MR. GAYLORD: No, but I'm saying that that demonstrates that we really can't effectively cross-examine his opinions because

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Internet Archive in 2014 http://www.tobaccoindustrydocuments.ucsf.edu/docs/jqhl0001

his opinions are based on exactly what he says there, and that is the nature of that. I mean, that is one of the couple of major ways to say why this whole testimony is flawed.

I didn't mean to jump into that now because we want to finish the bits and pieces and come back to it.

THE COURT: I need to know for the record whether you agree or disagree that the material I just identified should be stricken under the State vs. Milbradt rule?

MR. GAYLORD: I agree that material has to be stricken. I believe it's a bigger problem than that.

THE COURT: We'll get to the bigger problem.

Do you agree that it has to be stricken?

MR. DUMAS: Yes, Your Honor.

THE COURT: All right.

Now, on Page 37, Line 9, the question uses the phrase contrived. "Do you think that you would have been as likely to have been chosen to give presentation of evidence before this jury if you had decided that in fact it was not contrived that it was true in this case?"

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

It seems to me that question is potentially flawed as well because it refers to the witness's opinion and another witness's contriving testimony.

MR. DUMAS: I agree.

MR. GAYLORD: I think I need to reserve a position on this and actually with respect to the other one we just talked about because I don't disagree that the case law says we can't let this kind of testimony go forward. I do disagree that we can have this testimony in principle, the direct testimony, go forward handicapped by this kind of necessary restriction on the cross-examination.

The effect of it is we really can't explore the basis for his opinions which he has allowed us a clue to here.

THE COURT: Okay. I understand your point. I need to consider it as a larger point.

For now, let me add to my exclusion of testimony the material on Page 27, Lines 9 through 18.

MR. GAYLORD: 37.

THE COURT: Page 37, I'm sorry, Lines 9 through 18, because I believe that continues the

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Tobacco Industry Documents Library http://industrydocuments.ucsf.edu/docs/jqhl0001

flaw about the witness commenting on Mrs. Williams' testimony as being contrived.

Now, the next question by Mr. Thomas goes back to whether Mr. Williams believed something, and so I don't think that is a problem because, of course, that is a foundation of his opinion from reviewing medical records and from reviewing employment records and so forth. The witness has said on direct that he has an opinion about Mr. Williams being able to quit smoking.

And though the word contrived appears in the form of the question, you know, without the predicate, it doesn't run afoul of the Milbradt Rule. So, I don't think that particular piece is a problem.

Then I go to Page 39, on Page 38 the witness has said that Mr. Williams was dependent. Well, he is being asked about whether he was dependent on nicotine. And at the top of Page 39 he acknowledges he was.

And then there's an objection at Line 7. Argumentative. I would overrule that objection and leave that material in.

MR. DUMAS: If I may, Your Honor, I would augment that objection. Mr. Thomas phrased his

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

question, "you would agree with me if I said." I don't think argumentative is the proper objection there. I think it's improper for counsel to place his own credibility at issue.

THE COURT: Well, if I could count one time that Mr. Thomas said, "you would agree with me that," during this trial, that has gone in without objection, I can count 500 times. It happens to be some way that he phrases things.

And it is true we are not supposed to have lawyers opinions, but I can only rule on the record for objections made at the time which could have been cured. And so you are stuck with the record being the way it is.

The argumentative objection is overruled.

I don't have another objection until Page 49. Am I tracking adequately with all of you?

MR. GAYLORD: I think you're right.

THE COURT: Okay.

The objection is to the last part of the question about thousands, hundreds of thousands of people a year are dying from the use of cigarettes. That is beyond the scope of the witness's direct testimony.

I would strike the question and this long

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

answer by the witness.

I would, for purposes of the jurors, I don't know if we need Mr. Thomas's reservation on the record. But that is something we can decide later.

Then we have Redirect on Page 50, an objection as leading. The objection is sustained.

So, the question on 18 through answer on Line 21, and the objection on Line 22 is out.

And then we get into some interesting territory. I'm on Page 42. This line of questioning seems to be responsive to the material about the witness's opinions of Mrs. Williams' testimony which I have now stricken.

MR. DUMAS: I'll withdraw it, Your Honor.

THE COURT: And I would agree that it is outside the scope in some respects.

So, but what I want to do is just tentatively move it out and then see where that leaves us because we have got to go back to consider the larger objection.

So, the defense is then withdrawing on Page 52, Line 5 how far? 53, Line 23?

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Tobacco Industry Documents Library http://industrydocuments.ucsf.edu/docs/jqhl0001

Mr. Dumas?

MR. DUMAS: Your Honor, I think it would go to Page 53, Line 4.

MR. GAYLORD: The next question is, "Go ahead, Doctor." So, he continues the same answer.

THE COURT: Now, all of this has to do again with being responsive to the criticism of Mrs. Williams, and that is really not responsive. So, that takes us down to the question on Line 24, one final question, and the answer.

MR. DUMAS: Okay. So, Line 52, Line 5 all the way to the rest of the page; correct?

THE WITNESS: Yes. And then Page 53, all of it through Line 23 is out, and the question on Line 24, leading up to Line 8, the objection is asked and answered which is really cumulative, and that is correct. That objection would be sustained.

And I think that literally would take us to all of that page, Page 54, Line 8. All of that would be out because the rest of that is related colloquy.

Now we are on Page 55 with Mr. Dumas rephrasing or trying to restate the question. It

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Internet Archive in 2014 http://industrydocuments.ucsf.edu/docs/jqhl0001

is same question and the same ruling. So, I would strike all of that.

And I don't allow Recross per say. So my question is --

MR. GAYLORD: This was intended as an offer of proof, which was not Recross for the jury. This was presentation for support of our objection to the whole testimony.

THE COURT: Okay. So now let's go back and consider the main objections. And I'm ready to listen.

MR. GAYLORD: Okay.

Your Honor, I think there are, in my mind, at least two categories of problems with the main thrust of this testimony.

One of them is the same one that we really visited yesterday, having to do with the inadequacy of foundations for this witness and these opinions, as a matter of scientific or technical knowledge, failure to comply with the criteria of our various state versions of the O'Key and State vs. Lyons cases. The criteria being, and I can recite from one of Defendant's briefs in this case.

One, whether the theory or technique in

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Tobacco Industry Documents Library http://industrydocuments.ucsf.edu/docs/jqhl0001

question can be and has been tested. I believe there's been essentially a concession that that is not the case here.

Two, whether the theory or technique has been subject to peer review and publication. Likewise, I don't believe there's any suggestion that there has been, and I think that was conceded.

Third, the known or potential rate of error and the existence of operational standards controlling the techniques of operation.

I think it is inherent in the nature of this testimony that it cannot be tested for potential rate of error. It is just the raw opinion of one guy who has a degree in psychiatry.

And, fourth, the degree of acceptance of the theory or technique in the relevant scientific community.

What we heard from Dr. Turco is that psychological profiling is done for police agencies, and they like it a lot.

THE COURT: I have ruled psychological profiling out.

MR. GAYLORD: Where I'm going is, as the

http://legacy.library.ucsf.edu/tid/szq07a00/pdf Courtesy of http://www.industrydocuments.ucsf.edu/docs/jqhl0001

offer of proof part of this transcript demonstrates, he put a different name on it and did the same thing. This testimony is nothing more or less than a psychological profile.

Mr. Thomas established in the first several questions of this what is labeled Recross-Examination but the offer of proof on Page 56.

THE COURT: Okay. I haven't read that. So let me read that. I just saw it, Recross, and I thought that would be an easy one.

MR. GAYLORD: Okay.

THE COURT: It's not. Let me read it, please.

Okay. I have concluded reviewing that part of the transcript of Dr. Turco's testimony that is labeled Redirect Examination.

Go ahead, Mr. Gaylord.

MR. GAYLORD: I think this evidence, and by that I mean the whole point of Dr. Turco being here and his opinions, violates several rules. One of them is Rule 702, which we have talked about, the qualifications for expert opinion. One of them is Rule 403, because this gets us into a place we just can't possibly respond to.

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Tobacco Industry Documents Library at UCSF http://www.industrydocuments.ucsf.edu/docs/jqhl0001

We have battle, I suppose, of experts coming in saying I believe her, I don't believe her, and it's clear that a significant part of the underpinnings of Dr. Tuco's assessment, quote/unquote, assessment of this case is his belief that Mayola Williams is being opportunistic.

On Page 62, he explains that in somewhat more detail. We have rules about the kinds of evidence that is admissible for character purposes. This doesn't meet any of them.

I didn't pull off a citation to that rule, but that is just a separate reason why this is inadmissible evidence.

On the psychological profile assessment question, Your Honor did rule out psychological profile. I think these first several pages of the offer of proof demonstrates that he's -- all he has done is refrained from using that label for what he does. He acknowledges here that this is, for all intents and purposes, this so-called profile in action. And I think that is a flawed concept.

I don't think and I understand it's not the most helpful analogy, but I think it's a

http://legacy.library.ucsf.edu/tid/szq07a00/pdf Courtesy of http://industrydocuments.ucsf.edu/docs/jqhl0001

reasonable analogy to say, if a psychiatrist can come in and make this sort of an assessment of what a person would have done prospectively, based on the kind of guy he seems to be, would he or wouldn't he have quit smoking? Would he or wouldn't he have really been trying, when he says he was trying to quit smoking? What is the difference between that and saying Plaintiff is the kind of risk taker who would have run a yellow light?

These are the kinds of things that have the appearance of relevance because the jury wants to know that kind of information. But the idea that a person, after the fact, reading deposition, discovery deposition transcripts, can come to these kinds of conclusions and be qualified to share them with the jury to somehow boost their knowledge on the material issue is, if that is what we have come to, we have massively changed our court system.

I think the glimpses that he gives us of his underlying reasons, where on Page 62, 61 and 62, he's asked did he conduct a psychological profile of Mrs. Williams or other family members, he says no.

http://legacy.library.ucsf.edu/tid/szq07a00/pdf Courtesy of http://industrydocuments.ucsf.edu/docs/jqhl0001

And then on 62, "I'm not saying that I have done a psychological assessment profile of Mrs. Williams, but I think that material is very relevant in the context of her goal-directed behavior to have a lawsuit against the Philip Morris Company."

The rule that this violates is Catch 22. In other words, the basis for his opinion that Mrs. Williams is making stuff up is, after all, she's the kind of person who would bring this lawsuit. This stretches the relationship between relevance and undue prejudice so thin that it snaps. This violates Rule 403 way out of bounds on Rule 403 analysis, and that is key.

And as I started to say earlier, when we were talking about the individual objections, working backwards from what he has to say about Mrs. Williams and her so-called contrivance and her so-called goal-directed motivations to bring a lawsuit, even if it was fair to let him start telling the jury about his concoction of an opinion about what Jesse Williams would have done hypothetically, we can't cross-examine effectively because we can't go into the fact that he's basing that, at least in part, on his

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

notion that what Mayola Williams told us about Jesse Williams is concocted, is contrived for purposes of a lawsuit.

I do think there are several different routes you can get from here to there several different ways. It violates Rule 702. It violates Rule 403. It violates Rule 404 on character evidence admissibility.

Evidence of a person's character is not admissible for purposes of proving that the person acted in conformity therewith on a particular occasion.

Except, and there are none of the exceptions could possible apply here.

At the core, what Dr. Turco is trying to be is a character witness against Jesse Williams saying what his character was. You can substitute the word character for the phrase he uses throughout his direct testimony. Personality; character. He is saying Jesse Williams is the kind of guy who could have quit smoking if he wanted to and who was so independent and self-aware and self-defined that the in fact he didn't quit smoking only means he didn't want to.

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

And, I guess, my last thrust on what's wrong with that is if ever testimony was offered that jumps into the jury box and takes over their role in the case in an attempt to tell them, I mean, this witness could have been labeled the witness who is here to say who's right and who's wrong in this case. And I don't believe we swear witnesses and rely on their expertise to say who should win this lawsuit.

My best shot is 403. I really believe this is outside of 403.

THE COURT: All right. Thank you. That was helpful.

Mr. Dumas.

MR. DUMAS: Your Honor, I don't have much to add to what I said yesterday.

I don't think Dr. Turco's testimony -- and as he stated on Page 62, he said it's routine for forensic psychiatrists to do exactly what he did in this case, which is to look at the medical records, look at depositions, look at trial testimony and to give opinions about medical conditions regarding what he learned.

This is no different than Dr. Benowitz getting on the stand saying I looked at the

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

medical records, I looked at Mayola Williams' deposition testimony, which she said Jesse Williams tried really hard to quit and which Jesse Williams told her that he could not quit, and on that basis I conclude Jesse Williams was addicted.

There's mentally no difference in my opinion, Your Honor, from a 702 perspective, a 104 perspective or a 403 perspective.

How can you cross-examine Dr. Benowitz? He's going to have to necessarily -- a lynch pin of his testimony is necessarily the conclusion that he believes Mayola Williams' testimony.

You are right in the same soup of doctors relying upon what they hear.

I think if you go back to 702, you have got an expert who's got an opinion. His opinion may or may not be of assistance to the trier of fact. They may or may not accept it.

Counsel cross-examines vigorously on the limitations of Dr. Turco's testimony. The jury will be instructed that they may disregard it if they don't find it approach testimony.

I think it should come in, particularly as the Court has --

http://legacy.library.ucsf.edu/tid/szq07a00/pdf Courtesy of http://industrydocuments.ucsf.edu/docs/jqhl0001

THE COURT: Well, before I can rule on all of these legal issues, I want to go back to the point that Dr. Turco's testimony on direct is cumulative of what's already in the record on behalf of the defense.

And I would like help from both sides in a summarizing for the record what evidence there already is on the question, on the proposition that Mr. William could have quit smoking if he chose to.

MR. DUMAS: There is testimony in the record from Dr. Raffle, as I recall, that in his opinion Jesse Williams could have quit. His opinion, however, had a different basis than Dr. Turco's.

His opinion was Jesse Williams could have quit because everyone who smokes cigarettes, it doesn't matter if they are nicotine dependence or not, can quit because the addictive properties of nicotine are such that people can exercise their decision to quit and they can simply quit unlike heroin and other types of drugs.

Dr. Turco's testimony is, bottom line, is essentially the same. I will concede that. But he says I'm not an addiction specialist, but I

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Tobacco Industry Documents Library http://industrydocuments.ucsf.edu/docs/jqhl0001

believe Jesse Williams could have quit because of his personality characteristics and his makeup, and he articulated the reasons for that.

I would also note for the Court that, as I timed my direct exam, my continuation was exactly 20 minutes beyond the original 15 minutes.

THE COURT: I noticed that, and I appreciated your trying to make it brief. But the cross, of course, though --

MR. DUMAS: Well, I can't control that.

THE COURT: Well, but the cross is part of the issue in the sense of what they can or cannot fairly inquire into based upon the direct examination. So I'm not critical that you didn't try to make it tight.

I'm just trying to figure out, with everyone's help, what the state of the record is on the issue that he could have quit smoking.

MR. DUMAS: And that is my -- that is my analysis of it.

A related issue, I guess, would be, Your Honor, I would acknowledge that cumulative is very much discretionary with the Court, depending on the Court's judicial philosophy regarding

http://legacy.library.ucsf.edu/tid/szq07a00/pdf Digitized by the Tobacco Industry Documents Library http://industrydocuments.ucsf.edu/docs/jqhl0001

that, but I do think a Defendant that is being sued for $100 million dollars ought to have an opportunity to put a couple of experts on the stand and give their opinions; even if there is some overlapping, fundamental fairness does motivate us in that respect, motivate the Court in allowing slightly cumulative testimony.

THE COURT: Thank you, Mr. Dumas.

MR. GAYLORD: Your Honor, on the question of cumulative effect, I think Dr. Raffle covered the territory that there was for the defense to respond to. He was responsive to Dr. Benowitz.

They essentially have different philosophies about what addiction is and what it means to the people that have it with respect to smoking.

And whether they call it dependence or addiction or what have you, those lines are very blurry, but they disagree about whether or not Jesse Williams probably could have quit smoking.

In a minor degree, I don't think Dr. Benowitz ever said Jesse Williams couldn't possibly have quit smoking. I think what he said was Jesse Williams -- there is a thing that you can call addiction or chemical dependency, and

http://legacy.library.ucsf.edu/tid/szq07a00/pdf Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

Jesse Williams had it.

Dr. Raffle is adequate in response to that because he's directly on the opposite side of the notion what is the relationship between nicotine in cigarettes and the things that smokers can do about it.

I hesitate to say that Turco is purely cumulative because I really believe the biggest problem with Turco is that he goes across the line, beyond what it is relevant, admissible, reasonable evidence on the subject.

But to the extent that there was a Plaintiff's position to be responded to for the defense, that was covered. Turco was out of that bounds.

One, one hark back in response to something, if I can, to something Mr. Dumas said. He said that psychiatrists deal with this kind of medical condition all of the time. And I just want to say if there was a medical condition here he might have a leg to stand on to say that this idea of a psychiatric assessment was admissible thing to do.

His testimony is there is no medical condition here. This guy is normal. Now, we are

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

talking personality. Excuse me. That is all.

THE COURT: I'm sorry. You're finished?

MR. GAYLORD: Yes.

THE COURT: Well, it's not at all unusual for a psychiatrist to testify in civil actions for damages. Mostly though they have a foundation from which they can testify beyond just reading the record. Mostly, psychiatrists testify in that setting after doing an MMPI, independent medical examination or he evaluating the persons whose mental health issues are and is at issue.

I will say that I have never encountered a situation in practice or on the bench where a psychiatrist testified or even tried to testify about a personality trait based solely on a paper review of the record. And I'm not saying that is the standard under Oregon law. I'm just saying it's something new to me. I have not seen that happen.

That the field of psychiatry is developing along the lines of personality profiling was evident from Dr. Turco's testimony, outside the presence of the jury yesterday, and that there may be well-found bases in psychiatric

http://legacy.library.ucsf.edu/tid/szq07a00/pdf Digitized by http://www.industrydocuments.ucsf.edu/docs/jqhl0001

study for profiling kind of opinions to be helpful, in and outside the Court arena, is also apparent.

The question really is whether, cut to its bones, Dr. Turco's direct testimony is admissible as expert testimony, helpful to the jury, and if it's admissible whether it's nevertheless unduly prejudicial for the reasons the Plaintiff has articulated.

And I will simply say, as to my concern about trying to be able to resolve this on an easy ground, which is to say it's cumulative, I accept Mr. Gaylord's point as agreeing with Mr. Dumas, it is cumulative but not cumulative because the basis is different.

And so both sides are focusing on that but with a different outcome.

The basis is an actual effort to offer a psychiatric opinion about Mr. Williams' ability to freely choose to quit smoking, based solely upon a psychiatrist's review of medical records which are pretty scant, I will say, in observation on the issue of quitting smoking.

I mean, there are entries about getting Nicorette gum and there is some family testimony

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

about talking to Mr. Williams about it, but there isn't a lot of medical documentation in the affirmative way about what Mr. Williams was or wasn't going to do about it, other than the one entry that Dr. Turco reminded us about yesterday that, quote, "he was going to think about it," when a physician asked him about it.

That there might have been a problem in cross-examining Dr. Benowitz on his opinion about addiction and that Dr. Benowitz might have relied upon family input doesn't really resolve this question.

Dr. Benowitz testified, without objection, on the issue of whether Mr. Williams was addicted, and there has been contrary direct evidence in the Defendant's case offering a different opinion, that he was not addicted.

So, this jury has expert testimony on both sides of the coin. This jury also has evidence about a variety of definitions of what it means to be addicted, which was amplified yesterday by Dr. Raffle's testimony.

And I think something that the jury focussed on right from the beginning in voir dire, we had a lot of discussion of some of the

http://legacy.library.ucsf.edu/tid/szq07a00/pdf Digitized by the Internet Archive in 2014 http://tobaccodocuments.ucsf.edu/docs/jqhl0001

jurors who were not actually seated, about how do you define addiction, and that point has been, I think, developed on both sides of the case.

So, there is a lot of evidence in the record about nicotine and addictive properties and are they or aren't they applicable to a smoker? And how does that effect the 50 million cigarette smokers who have successfully quit?

That is a number that has come out in the defense case over and over and over again, and was repeated yesterday by Dr. Raffle.

My fundamental reaction to Dr. Turco's direct testimony is this. I think he believes that Mr. Williams was a personality type where, had he chosen to quit, he could have. I think that is clearly his opinion.

And that may be a sufficient opinion for purposes of reaching it to discuss it with lawyers.

The question is whether it's sufficient enough to overcome the objections raised by Plaintiffs concerning the scientific basis of this kind of analysis. Because we don't have an MMPI. We don't have this being a treating doctor. We don't have any person contact between

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

Dr. Turco and Mr. Williams. And we have a conclusion, the foundation of which is simply the review of medical records and employment records that weren't really explained, which have a pretty, as I said earlier, scant reference to the issue about deciding to quit smoking.

And then we have the whole business of the family's point of view on that, all of which the jury knows about already, that many members of his family did quit, and that among other relatives Mrs. Williams was a persistent urger of her husband to quit smoking.

It just doesn't seem to me that there's been -- that there is an adequate basis for a psychiatrist to offer an opinion from the review that we have.

I'm not saying that Dr. Turco didn't have the opinion or that his professional intuition, if you will, isn't reliable for his purpose, but I'm worried about letting this opinion in, over the objection of the Plaintiff, with the arguments about it being improper character-type evidence and there being such a slim foundation in terms of a factual basis on which the witness can rely.

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

And I'm not being critical. That is all there was to look at. Mr. Williams was dead, and there wasn't a chance to do a psychiatric evaluation.

Telling the jury that he's a good and decent hard-work man is something they already know.

Telling the jury that he was hard-headed or opinionated is something they already know.

The only thing they don't know is that a psychiatrist believes he could have quit if he had chosen and that that is an opinion reached from looking at the records.

But fundamentally, to me, that is not of help to the jury. It is not helpful because it's something that is within their own common understanding, given all of the evidence they have heard in the case.

So, I'm concluding that, on balance, under 403, the potential error factor outweighs the probative value that could result from this case.

The defense has plenty of evidence in on this point, and that I'm not going to allow Dr. Turco's perpetuated testimony to be presented

http://legacy.library.ucsf.edu/tid/szq07a00/pdf Digitized by the Tobacco Industry Documents Library http://industrydocuments.ucsf.edu/docs/jqhl0001

to the jury.

And I suppose that means, theoretically, I have to tell them to disregard what they heard yesterday altogether.

Anything else for the record on this point?

MR. DUMAS: Yes, Your Honor.

I would have Defendant move to mark the hard copy of the deposition as a Court exhibit for the record and that it be treated, of course, as an offer of proof.

THE COURT: Sure.

MR. DUMAS: Thank you.

THE COURT: What is our next Court's exhibit number? 4?

THE CLERK: No, the video is 4.

THE COURT: Do you want the video marked, too?

MR. DUMAS: Yes, both please, Your Honor.

THE COURT: Okay. The video is 4. The transcript is 5.

MR. DUMAS: Thank you.

THE COURT: Okay. Anything else before we bring in the jury? You have got a transcript issue you wanted me to resolve? Excuse me just a

http://legacy.library.ucsf.edu/tid/szq07a00/pdf Courtesy of http://industrydocuments.ucsf.edu/docs/jqhl0001

minute. Off the record.

* * *

(Whereupon, after a recess, the proceedings continued, as follows:)

* * *

THE COURT: Okay.

What else can we do before we bring in the jury?

MR. GAYLORD: I understood Defendant would rest at this point. I don't mean to speak for them, but --

THE COURT: Subject to confirming receipt of exhibits, outside the jury's presence; is that right?

MR. DUMAS: That's correct, Your Honor.

MR. SIRRIDGE: That's correct.

THE COURT: I would like you to do that in the jury's presence.

MR. DUMAS: Yes, I was going to do that.

THE COURT: So, that they know.

MR. DUMAS: Yes.

THE COURT: Okay.

Then anything else you need me to rule on, folks, before we bring in the jury?

MR. GAYLORD: Your Honor, what we are

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Tobacco Industry Documents Library http://industrydocuments.ucsf.edu/docs/jqhl0001

going to do is offer the video deposition of Dr. Primack.

THE COURT: Tell me his name again?

MR. GAYLORD: Primack, P-r-i-m-a-c-k.

THE COURT: P, like Paul?

MR. GAYLORD: Right. Primack.

THE COURT: And are there objections to that proffer at all? Anything I need to rule on regarding Dr. Primack?

MR. SIRRIDGE: There was -- there were a few objections but I think they probably got resolved during the pendency of the deposition or the testimony.

MR. GAYLORD: There was an objection that I made in cross-examination to the foundation for the authoritative test. And what I might do is just hand up my copy and let you read two pages, and I don't think I have anything more to say about it than what I said there. It states on Page 45, line -- well, the question is on 43, Line 25, and it goes over to the next page.

THE COURT: All that the witness said about the authoritativeness of this book, the statement, quote, "many pulmonologists and many chest radiologists would read this book"?

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Tobacco Industry Documents Library http://industrydocuments.ucsf.edu/docs/jqhl0001

MR. DUMAS: No. There's more that to that, I recall. I don't have it in front of me, but as I recall Dr. Primack went on to stay that he has relied upon --

THE COURT: Oh, I see.

MR. GAYLORD: The witness asks what do you mean authoritative? Mr. Sirridge gives him a definition, and then he answers that it's authoritative under that definition. And then I object to his definition.

THE COURT: All right.

Let me start on Page 44 and read through 45. So, I take it, I'm in Cross-Examination here by Mr. Sirridge; is that right?

MR. GAYLORD: Yes.

THE COURT: Where is it first introduced, this book, to the witness?

MR. SIRRIDGE: I think it's over on the bottom of page 44, Your Honor, Line 11.

THE COURT: Okay.

"Are you familiar with a textbook by Dr. Frazier and Pare?"

MR. SIRRIDGE: Pare.

THE COURT: Pare, P-a-r-e.

Mr. Gaylord, I have read from page 44

http://legacy.library.ucsf.edu/tid/szq07a00/pdf Digitized by the Tobacco Industry Documents Library http://industrydocuments.ucsf.edu/docs/jqhl0001

through 47, which is ultimately where the witness talks about the passage out of the textbook that Mr. Sirridge is quoting him on, and he's agreeing with it, ultimately.

If he had been handed a book with which he disagreed and that disagreement was being pointed up as an impeachment factor and the witness was hedging or equivocating about whether it was authoritative, we might have a problem.

But, ultimately, the witness agrees with the statement. So, I don't think, while it's not a model of clarity in terms of laying the foundation, it's not inadmissible the way it ultimately came out.

Anything else I need to deal with here?

MR. GAYLORD: No. I'm having a minor technical problem, because I wanted to have the ability to switch, to stop the video and just switch for a moment to each of the x-ray films as they were introduced by the witness, but I think our machine has a burned-out light, maybe.

MR. THOMAS: What we are doing at the moment is looking to see whether we can't get one of the courthouse viewers.

THE COURT: As in x-ray box?

http://legacy.library.ucsf.edu/tid/szq07a00/pdf Digitized by the Tobacco Industry Documents Library http://industrydocuments.ucsf.edu/docs/jqhl0001

MR. THOMAS: Yes.
THE COURT: I take it we don't have the big one anymore? It's gone?
MR. THOMAS: Apparently, that has been loaded on a semi and taken away.
MR. SIRRIDGE: If they need it, it's here.
MR. DUMAS: It's in the courthouse.
THE COURT: Where is it?
MR. SIRRIDGE: It's around the corner, because we didn't know if we could put it in your office without permission.
THE COURT: Can we use it? May they use it?
MR. SIRRIDGE: Sure.
MR. THOMAS: All right.
THE COURT: Dan, would you help them get it, please?
MR. SIRRIDGE: It's only fair. We have been using their stuff.
THE COURT: Thank you, Mr. Sirridge. I appreciate that.
Oh, good. Here comes Mr. Cofer.
Mr. Gaylord, are you otherwise technically ready?

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Tobacco Industry Documents Library at the University of California, San Francisco. http://industrydocuments.ucsf.edu/docs/jqhl0001

MR. GAYLORD: This will be fine, yes.
THE COURT: Okay.
I'm going to need a little eye contact with the jury before we start. Is that possible or should I just stand?
Just put it back, and I'll just stand. It's a lot easier. That's fine. It's fine. Okay.
Have we done everything you want to have done for the record?
This other deposition we'll take up later? Whatever. That is all right.
Then please bring in the jury.
MR. GAYLORD: You're going to instruct them about Dr. Turco, Your Honor, I understand?
THE COURT: Yes.

* * *

(Whereupon, after the jury was brought in, the proceedings continued, as follows:)

* * *

THE COURT: Jurors, good morning.
JURORS: Good morning.
THE COURT: When you left yesterday, there was a witness on the stand, Dr. Turco. For reasons that you should not concern yourself

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

with, I have ruled his testimony inadmissible. So, he's no longer here, obviously. And disregard that which you did hear from him yesterday. That is now out of the record for purposes of the case.

With that, I understand --

MR. DUMAS: Subject to verification of the actual admission of defense exhibits, Your Honor, Philip Morris rests.

THE COURT: The Defendant having rested its case, we are now moving to the Plaintiff's rebuttal case, which is expected to take today and maybe a little bit tomorrow morning, maybe a lot tomorrow morning, but tomorrow morning, and it's expected that by tomorrow afternoon the case will be argued. At least, that is when we'll begin the arguments. And they'll continue on to Thursday. And depending upon when the arguments finish, I'll instruct you either late in the day on Thursday or first thing Friday morning.

And that is a judgment I'll make depending upon how long the arguments end up actually taking and just how effective it would be to argue, depending upon the time in the day.

So, the case will definitely be in your

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Tobacco Industry Documents Library at UCSF http://tobaccodocuments.ucsf.edu/docs/jqhl0001

hands on Friday morning, after instructions, if it is not until Friday morning that I instruct.

You should plan that your noon hour recess on Thursday and on Friday will not be really free time for you.

On Thursday it might be a close, a short recess, and depending on how that goes I may just have you stay here and order lunch so that we can get the best use out of the day.

But don't plan anything for your noon recesses on Thursday or Friday.

Okay. We're now ready to proceed with the Plaintiff's rebuttal presentation.

Mr. Gaylord.

MR. GAYLORD: Thank you, Your Honor.

Just by way of introduction, we are going to play the videotaped testimony a Dr. Steven Primack. This was taken up at Oregon Health Sciences University last Friday, March 19th, according to the transcript, beginning at 4:30 p.m. And it goes for roughly an hour, give or take, ten minutes. I don't know precisely.

If I might, Your Honor, I just want to introduce what we have done with the exhibits that will be here in front of the jury while this

http://legacy.library.ucsf.edu/tid/szq07a00/pdf Courtesy of http://tobaccoindustrydocuments.ucsf.edu/docs/jqhl0001

plays.

The view box has on it four copied x-rays. They are copies of the same x-rays that are the originals of the lateral films.

For our record, I'll tell the court reporter and the jury what I have done to mark them with exhibit numbers.

In the transcript or in the videotape that you're going to see, they are referred to as Exhibit 1, 2, 3 and 4 deposition exhibit numbers.

I have added to those stickers the marks Exhibit 181, 182, 183 and 184, because it ends in the same number, and it will be less confusing that way, and those were available numbers.

And you will see Dr. Primack making reference to them. He made arrows on two of them that will be explained. And so we have just put them in front of you because they are very difficult to see on the videotape. The video camera can't cope with light contrast that well. That's my introduction.

THE COURT: Do we need the lights in the room turned off?

MR. GAYLORD: Dimming them probably wouldn't hurt.

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Tobacco Industry Documents Library at UCSF http://industrydocuments.ucsf.edu/docs/jqhl0001

THE COURT: Well, it's on or off. That is our sophistication around here.

MR. GAYLORD: I would vote off. I think it's easier to see these things.

THE COURT: Any problem with them coming off? Okay. Let's turn them off and see if that helps.

Jurors, let us know if you need them back on.

MR. GAYLORD: The voices will be me asking the first set of questions, Mr. Sirridge asking the cross-examining questions, and me again with Redirect.

THE COURT: Thank you.

Proceed.

MR. GAYLORD: Thank you.

* * *

(Whereupon, the videotaped examination of Dr. Steven Primack was played to the jury; after which, the proceedings continued, as follows:)

* * *

THE COURT: We'll take the morning recess while we get set up for the next presentation.

Jurors, 15 minutes, please.

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

* * *

(Whereupon, after the jury exited the courtroom, the proceedings continued as follows:)

* * *

THE COURT: Counsel, do you anticipate that you'll be wanting an x-ray viewer for closing argument? A question.

And secondly, do you anticipate that the jury may need a view box for their deliberation on the question of looking at the exhibits which are radiographs? If so, we need to think about how to deal with that.

MR. GAYLORD: I know there are a lot smaller ones in the courthouse, if we need to get one for deliberations. I was going to suggest might be a better way to go one x-ray at a time versus --

MR. SIRRIDGE: We can certainly make that available.

THE COURT: Well, I'm just thinking about your closing arguments to the extent that you're going to be debating to the jury the various doctors' perspectives about what is seen or isn't seen. And to the extent this was about to go out of the building, I just wanted to remind

http://legacy.library.ucsf.edu/tid/szq07a00/pdf Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

everybody that maybe there would be use for it at least for closing arguments.

So, think about that.

MR. SIRRIDGE: We'll think about it.

THE COURT: Okay. Deposition transcript?

MR. TAUMAN: Yes. I don't have them. Let me call Mr. Coon. I asked him to be here at 11:10. But he's our cumulative man.

MR. GAYLORD: For the record, I would like to offer Plaintiff's Exhibit 181, 2, 3 and 4, which are the copy x-rays from this testimony of Dr. Primack. And as a Court exhibit I have the original transcript of Dr. Primack.

THE COURT: All right. We'll mark that as, I think, Court Exhibit 6.

Any objection to the receipt of Exhibits 181, 182, 183 and 184?

MR. GAYLORD: Any objection to these?

MR. SIRRIDGE: Okay.

THE COURT: That was a no objection?

MR. SIRRIDGE: No objection.

THE COURT: All right. These are received.

MR. GAYLORD: Thank you.

THE COURT: What's the next presentation

http://legacy.library.ucsf.edu/tid/szq07a00/pdf Digitized by the Tobacco Industry Documents Library http://industrydocuments.ucsf.edu/docs/jqhl0001

on behalf of Plaintiff's?
MR. GAYLORD: We have Dr. Keppel here.
THE COURT: He's here live?
MR. GAYLORD: Yes.
THE COURT: Okay. So we don't need to do the transcript before. We can proceed.
MR. GAYLORD: No.
THE COURT: All right. We'll take the morning recess and take up in about 12 minutes now.

* * *

(Whereupon, after a recess, the proceedings continued, as follows:)

* * *

THE COURT: Mr. Gaylord.
MR. GAYLORD: Thank you.
Plaintiffs call Dr. John Keppel.
THE COURT: All right.
THE CLERK: Sir, step right up to the chair, please. Remain standing. Raise your right hand.

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Tobacco Industry Documents Library http://industrydocuments.ucsf.edu/docs/jqhl0001

DR. JOHN KEPPEL
was thereupon called as a rebuttal witness on behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

THE CLERK: Please be seated. If I can have you scoot this way, and then just slightly to your right, be careful not to roll off the edge there.
And then please state your name. Spell your first name and your last name.
THE WITNESS: John F. Keppel. J-o-h-n. Last name is Keppel, K-e-p-p-e-l.
THE COURT: Thank you.
Counsel.
MR. GAYLORD: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. GAYLORD:
Q. Dr. Keppel, I'm going to try to get through my questions for you in very short order. And this is the rebuttal period of the trial so we are not going to talk about everything but just some narrow issues.

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Tobacco Industry Documents Library http://industrydocuments.ucsf.edu/docs/jqhl0001

I'm calling you doctor. Will you tell the jury what kind of medical doctor, are you, sir?

A. I'm a physician who practices the subspecialty of pulmonary medicine or a lung physician.

Q. And go through for us, quickly, please, your educational stops from college through your formal medical training?

A. I went to Dartmouth College. Graduated in 1969 Cum Laude.

I went to the University of Rochester in Rochester, New York. Graduated in 1973 in the Honor Society, AOA.

I did three years of internal medicine training at Cleveland Metropolitan General Hospital in Cleveland, Ohio. Completed that in 1976.

I did a two-year fellowship in pulmonary disease at the University of Oregon Health Sciences center, having finished that in 1978e.

And I have been in practice in Portland as a chest physician since 1978.

Q. And you're board certified in internal medicine and chest medicine?

A. It's called pulmonary disease.

Q. Pulmonary disease.

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

A. So, yes, I'm board certified in both.
Q. And you're a member of the College of Physicians?
A. I'm an member of the American College of Chest Physicians. I'm a fellow in that. I'm a member of the American Lung Association. And also the AMA.
Q. And I see something on your CV, the American Thoracic Society. Is that another subspecialty group?
A. Right. The medical portion of the America Lung Association.
Q. All right. What part of town or the general area here do you practice in?
A. The first year of my practice I was at the Portland Clinic and spent just one year at St. Vincent's Medical Center.
Since 1979 I have been at the Thoracic Clinic, now called the Oregon Clinic, which practices primarily at Portland Providence Medical Center on the east side of the town.
Q. That is the one out beside the freeway on 47th?
A. With all of the parking garages.
Q. Can you characterize that medical center,

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

your location of the practice, in terms of its relative experience with lung cancer in our region?

A. Providence Portland has a tumor registry that goes back actually to the 1970s. And in the last two years it's had, in terms of lung cancer. The largest number of registered cases in the state. In that case, it was 222 cases for the year 1997. Data for 1998 aren't available yet.

Q. Now, the jury probably knows this, but just a reminder, when we talk about being a pulmonary or lung specialist, are you the kind of physician who uses the bronchoscope and performs bronchoscopy procedures on patients for diagnostic procedures?

A. Yes. I would say that lung disease is again sort of define as involving the structures of the chest, excluding the heart. So it would be the ribs, the lungs, the plura.

My practice would be about a third lung cancer or other cancers involving the chest; a third emphysema, bronchitis and asthma; and probably a third, because I have a special interest in occupational, I see occupational asthma, asbestos diseases; and then the more unusual disease would be the final third of my general

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Internet Archive in 2014 http://www.tobaccoindustrydocuments.ucsf.edu/docs/jqhl0001

practice.
Q. And in view of your special expertise in your area of practice, have Mr. Thomas and I asked you to review the medical records, x-rays, pathology reports, the whole clinical history and smoking history of Jesse Williams and consult with us in this case?
A. Yes, you did.
Q. I want to ask you about a brand of tumor that we have heard mentioned here in the courtroom called mucoepidermoid carcinoma. Are you familiar with that entity?
A. Yes, I am.
Q. Can you tell the jury about your experience and knowledge with that particular kind of cancer as a lung cancer?
A. I have never had a case myself. I'm aware of one case in February of 1990 that was in the tumor registry. It was not a case that I diagnosed. In over about ten years, that would be over 2000 cases, there was one case that I'm aware of.
Q. Okay. And when you say one case out of 2000 or over 2000, that is referring the whole lung cancer experience of your hospital?

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

A. Yes. The hospital tumor registry records all new cases for physicians within that hospital. So, it would be for that hospital.

Q. Okay. More precisely, has it been -- does the tumor registry show over 2300 lung cancers in that period of time?

A. Yes, I believe so, 2360 or something.

Q. And one mucoepidermoid?

A. That's correct.

Q. And I didn't ask you this, but I should have. When we talk about a person who does the bronchoscopy procedure, that is how biopsies are done frequently in lung cancer cases?

A. That's correct.

Q. And how frequently do you perform that procedure?

A. I do between 70 and 100 in a year, about two a week.

Q. And when you do that you use the instrument to take a bite out of the tumor and send it to a pathologist for them to look at under a microscope?

A. That's correct.

Q. And then you get a report back that tells you what kind of tumor or cancer or other thing it

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

was?
A. A report from the pathologist.
Q. All right. And so when you say you have never seen mucoepidermoid carcinoma, you mean in all of the times that you have done that biopsy procedure you have not had one come back that way?
MR. SIRRIDGE: Objection, Your Honor. That is leading.
THE WITNESS: That's correct.
MR. GAYLORD: I'll rephrase.
THE COURT: Thank you.
BY MR. GAYLORD:
Q. If you did a biopsy and it turned out to be mucoepidermoid cancer, would you get that information?
A. Yes, I would.
Q. With respect to -- let me back up.
You are familiar with the pathology reports from both the cytopathology, that is the brushings from the tumor, and the biopsy pathology in Jesse Williams' case?
A. That's correct.
Q. And are both of those things that you perform when you use the bronchoscope?
A. Yes.

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Tobacco Industry Documents Library http://industrydocuments.ucsf.edu/docs/jqhl0001

Q. You are familiar with the diagnosis given in this case on the pathology part of it, the biopsy part of it, calling it poorly differentiated carcinoma with adenosquamous differentiation?
A. That's correct. I'm aware of that.
Q. And you're familiar with the cytopathology reading from the brushings calling it keratinizing squamous carcinoma?
A. Yes, I am.
Q. First off, are those two statements in some way inconsistent as you know this diagnosis?
A. I think we have to -- when I do a biopsy, and you're taking a very small piece, and in this case it was recorded as less then a half a centimeter of one area with the biopsy.
I will often do a biopsy and then take the little brush which will loosen up material all along the area of abnormality.
So that the brushing is a way of sort of scraping external cells off over a little larger area.
We really send in both because sometimes the biopsy will be negative and the cytology will be the only thing to give the diagnosis.
And occasionally we get different results

http://legacy.library.ucsf.edu/tid/szq07a00/pdf Digitized by the Tobacco Industry Documents Library http://industrydocuments.ucsf.edu/docs/jqhl0001

from both.

And occasionally, just the biopsy will be positive and not the cytology.

Q. Okay. Among the cases of cancer that you have seen and that you have participated in the diagnosis, have you seen squamous and adenosquamous carcinomas?

A. Yes, I have.

Q. Can you comment on the relative frequency of squamous or adenosquamous carcinomas in your experience?

A. I think the most common, given the bronchoscopic descriptions, would be a squamous carcinoma with a central abnormality that you can see directly that you scrape for cytology in biopsy.

So, squamous would be most common.

Adenosquamous, again with predicated by the undifferentiated carcinoma, so you start with something that, to me, means that it's so undifferentiated those characteristics are harder to make.

And then, in this case, it was classified as adenosquamous, which would be in my experience much less frequent than just squamous carcinoma.

http://legacy.library.ucsf.edu/tid/szq07a00/pdf Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

Q. Is there anything in your experience inconsistent with this cancer as it's been diagnosed appearing in the central bronchi, in the large airways and the trachea, of the lungs of Jesse Williams?

A. No. I think that particularly the squamous type is more likely to be found in that area.

Q. And are there adenosquamous carcinomas that also occur in that area?

A. Yes, there are.

Q. Based on what you have reviewed and are aware of in the records and pathology and x-rays and history of Jesse Williams, and based on your training and experience and subspecialty expertise, do you have an opinion, to a reasonable medical probability, first off, what type of cancer did Jesse Williams have?

A. Yes, I do.

Q. What is your opinion about that?

A. I think that he had a small -- bronchoscopy showed poorly differentiated squamous. He had a surgical biopsy postmortem. We very frequently find multi central kinds of tumors. So I think it might have been more on the squamous

http://legacy.library.ucsf.edu/tid/szq07a00/pdf Digitized by the Internet Archive in 2014 http://www.industrydocuments.ucsf.edu/docs/jqhl0001

side.

The way it progressed, the central involvement, the bleeding and the terminal bleeding are characteristics that I see with squamous cell carcinoma.

Q. With the limited biopsy that was done and with the cytopathology reported in this case, do you have an opinion whether, to a reasonable medical probability, his tumor was either squamous or adenosquamous cancer?

A. Yes. I mean, I think the pathologist read it as adenosquamous. I think if he had a bigger biopsy, they may have seen more of what's been described as keratinization, and it might be more likely to say squamous.

Q. Secondly, do you have an opinion, to a reasonable medical probability, based on what you have reviewed and all of your expertise, whether the cancer in Jesse Williams' case was a relatively aggressive and rapidly growing cancer?

A. I believe by the x-ray and clinical course that it, from diagnosis to death, was six months, and that is rapidly progressing cancer.

Q. Do you have an opinion to reasonable medical probability whether that is consistent with

http://legacy.library.ucsf.edu/tid/szq07a00/pdf Courtesy of the Tobacco Industry Documents Library at https://www.industrydocuments.ucsf.edu/docs/jqhl0001

being squamous or adenosquamous carcinoma?
A. I think those are more undifferentiated tumor than the biopsy showed, and it's consistent with that.
Q. This may be old news, but I'll run it by again.
Is the concept of poorly differentiated more or less synonymous with the concept of an aggressive tumor?
A. I think it is, with the concept being very malignant rapidly dividing.
Q. And then, finally, do you have an opinion, based on all of your expertise and all of the facts that you have about Jesse Williams' case, from his records, his history, to a reasonable medical probability, whether his cancer was caused by cigarette smoking?
A. I believe, based on my testimony, that it would be a cigarette smoking related tumor, particularly squamous.
MR. GAYLORD: Thank you, Dr. Keppel.
THE COURT: Cross-examination.
MR. SIRRIDGE: Thank you.

http://legacy.library.ucsf.edu/tid/szq07a00/pdf Digitized by the Tobacco Industry Documents Library http://industrydocuments.ucsf.edu/docs/jqhl0001

CROSS-EXAMINATION

BY MR. SIRRIDGE:

Q. Good morning, Dr. Keppel.

A. Good morning.

Q. Dr. Keppel, you were not involved in the diagnosis and treatment of Mr. Williams, were you?

A. Personally, no, I was not.

Q. None of his doctors called you and referred the case to you for your opinions on the case; is that right?

A. No, they did not.

Q. Who contacted you in this case?

A. Mr. Thomas.

Q. How long ago was that?

A. About two and a half months ago.

Q. Okay. Have you ever worked for Mr. Thomas before?

A. Not directly. I worked with his firm.

Q. How many times have you worked for his firm?

A. Again, these are an occupational lung cases. His partner, Mr. Royce, I think I had three or four cases with him.

Q. Three or four cases with Mr. Gaylord's

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

partner.
Have you ever worked with Mr. Thomas or Mr. Coon or Mr. Tauman?
A. We were speaking about Mr. Thomas.
Q. Oh, I'm sorry.
A. Mr. Royce was Mr. Thomas's retired partner.
Q. I'm sorry. Sorry. That was Mr. Thomas's firm. How about Mr. Gaylord's firm? Have you worked with his firm before?
A. No, I have not.
Q. How about Mr. Tauman's firm?
A. I have not.
Q. But you have testified a lot before, haven't you, Doctor?
A. Most of my testimony has been in asbestos-related lung disease.
Q. How many times have you testified in court?
A. Ten, 15 times.
Q. Are you sure it's not more?
A. I don't -- I don't think so.
Q. You have given a lot of depositions, haven't you?
A. That is different than court testimony.

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Industry Documents Library http://industrydocuments.ucsf.edu/docs/jqhl0001

Q. Yeah. But different cases. I mean total cases, how many different cases have you testified in?
A. Again. My interest is in occupational asthma and occupational lung disease. If you include depositions, maybe it's 30 or 40. I don't think it's more than that.
Q. And what side do you normally testify for predominantly?
A. Most often for the plaintiff.
Q. Most often for the plaintiff.
Have you been paid for your time in consulting on those cases?
A. Yes, I have.
Q. And how much do you make an hour?
A. On average, $240 an hour.
Q. $240 an hour.
And are you charging for your time today?
A. Yes, I am.
Q. At what rate?
A. The same rate.
Q. $240 an hour.
Doctor, you are not medically trained in the field of pathology, are you?
A. By that do you mean certified or any

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Source: http://www.industrydocuments.ucsf.edu/docs/jqhl0001

training in pathology?
Q. Are you qualified as a pathologist?
A. No, I'm not.
Q. Did you look at the slides in this case?
A. No, I did not.
Q. You mean to say that you are offering an opinion on the pathology in this case and you haven't looked at the slides?
A. I depend on my pathologist. I don't normally review the slides.
Q. Well, if you're depending on the pathologist, Doctor, wasn't the diagnosis in this case adenosquamous?
A. That's correct.
Q. Now, do you have expertise in reading chest x-rays, Doctor?
A. I read a lot of the x-rays of my own patients, yes.
Q. Doctor, as I was sitting, I heard you give an opinion on the causation issue in this case; is that right?
A. Yes, I did.
Q. Do you consider yourself an expert on the causation of -- strike that. Let me start that again.

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

Do you consider yourself an expert on the relationship between cigarette smoking and lung cancer?

A. I believe that I deal with it every day for 20 years, and, yeah, I have had as much experience with it as most physicians.

Q. Why don't you tell me the seven cell types of lung cancer by the WHO, the World Health Organization classification.

A. Well, there's three main types.

To start with, what's called small cell or undifferentiated cancer.

The second would be the adeno group of lung cancer. Those would be the ones derived mainly from muco cells, mainly along the peripheral line.

The third one is squamous-type tumors.

The fourth would be the mixed cell kind of tumors.

Q. Is there a particular type that is called?

A. Usually, they are, as in this case, in the form of undifferentiated. Adenosquamous would be in that category.

Q. Would be in what category?

http://legacy.library.ucsf.edu/tid/szq07a00/pdf Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

A. The mixed cell type.
Q. The jury has seen this before, Doctor, a listing of the WHO classification of lung carcinomas. Why is the mixed cell type category that you are talking about?
A. I think it would fit under large cell. Those are very large, hard to differentiate tumors.
Q. But it isn't called mixed cell carcinoma; it's called large cell carcinoma?
A. I would use it synonymously with that. But that is true; it's called large cell.
Q. What are the other three besides these?
A. There's fifth, adenosquamous that we talked about.
Sixth was carcinoids, which are relatively benign tumors.
And seven would be metastatic and all of the other unusual types.
Q. Metastatic and all of the unusual types.
I think you forgot one, Doctor. It's called bronchial gland carcinomas. That is number seven. That includes mucoepidermoid carcinoma, doesn't it?
A. Yes, it does.
Q. Tell me, Doctor, the Surgeon General in

http://legacy.library.ucsf.edu/tid/szq07a00/pdf Courtesy of http://www.industrydocuments.ucsf.edu/docs/jqhl0001

1982, the actual report on cancer, listed three lines of evidence for use in determining making a judgment that smoking causes lung cancer.

They listed epidemiological evidence. They listed pathological evidence. And they listed experimental evidence.

Does that sound reasonable to you?

A. I think the Surgeon General was a well-thought out report, yes.

Q. But are those reasonable categories of evidence to consider in reaching judgments about whether smoking causes lung cancer?

A. They are reasonable.

Q. They call this category epidemiology, epidemiological, pathological and experimental.

Doctor, the Surgeon General's report lists eight prospective studies that they rely on for --

A. Do you want to move that around so I can see it?

Q. Oh, sure. Sorry. I think it's got wheels.

See what I have done?

A. Yes, I can see.

Q. Can everybody see this back here?

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Tobacco Industry Documents Library at http://industrydocuments.ucsf.edu/docs/jqhl0001

Those are the three categories.
Doctor, the Surgeon General report lists eight prospective studies in epidemiology that are cited there. Can you tell me what those studies are?
A. I haven't looked at those. I couldn't tell you.
Q. You can't name one?
A. No, I can't.
Q. What about retrospective studies? Do you know what those are?
A. Prospective means you start with a group that you're looking at to see what happens in the future.
The retrospective means you take a population and see what happened in the past.
Q. All right. The Surgeon General lists 43 of those studies. Can you name any of them?
A. Not specifically.
Q. And how about pathology? There are a number of studies cited. I would say ten to 15. Can you name me a single pathological study which is used by the Surgeon General to study the whole issue of cigarette smoking and lung cancer?
A. Not specifically, no.

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

Q. No author? No textbook? No anything? You can't name me one?
A. I can't.
Q. Okay. Experimental. There are a number of studies cited in the Surgeon General's report in the experimental carcinogenesis area that's used for analysis. Can you name me some of the studies that are cited?
A. Again, I'm not an experimental physician. I can't name any specific ones.
Q. Doctor, isn't the plain and simple fact that you are not an expert in the relationship between cigarette smoking and lung cancer?
A. I think I'm not. I'm a pulmonary physician who treats these patients day in and day out, for the last 20 years.
Q. But you're not an expert on the causation of cigarette smoking and lung cancer, are you?
MR. GAYLORD: Objection. Argumentative, Your Honor.
THE COURT: Overruled.
THE WITNESS: No, I'm not.
BY MR. SIRRIDGE:
Q. And you didn't want to leave the impression with the jury that all lung cancer in

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

your experience is related to smoking, did you?
A. No, I did not.
Q. And there are types, in fact, which are not related to smoking; isn't that right?
A. That's correct.
Q. Carcinoid tumors are not related to smoking; isn't that right?
A. That's correct.
Q. Subtypes of adenocarcinoma are not related with smoking, were they?
A. Adeno subtypes, correct.
Q. Right. And bronchial gland carcinomas, including mucoepidermoid carcinoma, are not related with smoking; isn't that true?
A. That is true.
MR. SIRRIDGE: Your Honor, I think I have reached the point where I was going to use the x-ray machine, and that might take a while to set it up.
THE COURT: It doesn't take very long. We have seen you do that.
MR. SIRRIDGE: Very good.
Now, if I can just find the films that I had earlier.
BY MR. SIRRIDGE:

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

Q. Doctor, you said you reviewed the x-rays in this case?
A. Yes, I did.
Q. I'm going to ask you to come down, and you and I can figure out how to put them up here because I have a couple of questions to ask.
MR. SIRRIDGE: Thank you, Dan.
BY MR. SIRRIDGE:
Q. Dr. Keppel, I'm going to ask you to put these up. They're from January of 1996. Would you put those up for me. Please? Excuse me.
Have you reviewed these?
A. Yes, I have.
Q. Tell me, Doctor, can you see an abnormality on this film that was later found to be cancer?
Oops, we put two different things here.
Let's make sure we have the right ones.
A. One is February. One is the 22nd. One is 23rd.
Q. It's a good idea to match up the right PA and the lateral, isn't it?
A. Yes.
Q. All right. Well, let's go to January of 1996. Can you see -- and I take it you have seen

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

all of the others before and after this?
A. Yes. I think we have talked about retrospectively, and you look at areas that you have been aware of from future films.
Q. In fact, you were sitting right here when Dr. Primack was on the videotape, weren't you?
A. Yes.
Q. All right. Well, let me ask you on this film, January of '96, can you see the area that was later diagnosed as cancer on this x-ray?
A. Again, knowing where I looked before. I think this area in the hilum. I think we have had previous testimony, the hilum is a difficult area because there's so many tissues, arteries, veins, bronchus. But this area compared to this site is larger.
MR. GAYLORD: We have jurors who can't see.
THE WITNESS: Oh, I'm sorry.
A JUROR: And also speak up.
THE WITNESS: All right, speak up.
THE COURT: Thank you.
MR. SIRRIDGE:
Q. Now, this is the paratracheal stripe, isn't it, Doctor, right here? Right down here,

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Tobacco Industry Documents Library http://industrydocuments.ucsf.edu/docs/jqhl0001

isn't that the paratracheal stripe?
A. I think we have had testimony about it being a cylinder which has and an x-ray goes through the side of the pipe, basically showing the paratracheal stripe comes down here.
Q. Isn't the cancer here in the lower trachea? Isn't the abnormality in the lower trachea?
A. On bronchoscopy at a later time, it was September or October, it was down in that area.
Q. The actual bronchoscopy confirmed it was the lower trachea; isn't that true?
A. That is true.
Q. How about the lateral film in January, Doctor? Do you see an abnormality there that was later diagnosed as cancer?
A. Again, we are talking about, and Dr. Primack just talked about on the videotape, this area in the back posterior tracheal stripe. There is a density in this area which he had outlined that is denser on the lateral. I think you see it better here than you do --
MR. COFER: Excuse me, Mr. Sirridge. You are blocking the view.
BY MR. SIRRIDGE:

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Tobacco Industry Documents Library http://industrydocuments.ucsf.edu/docs/jqhl0001

Q. But the abnormality is apparent on both the PA and the lateral in January of 1991?
A. Again, I'm looking at having seen the other films, and I wouldn't want to prejudge this. I just saw these. And I never stood there and looked at them without any other context.
Q. But can you see it now?
A. Yes.
Q. Now, this was originally diagnosed a normal film with respect to the areas where there might be cancer, wasn't it?
A. Yes, it was.
Q. Well, let's look at February.
A. That's right.
Q. That is okay. We can take those down.
Now, this is February, a month later. Can you see the area of cancer on this film?
A. I should put up the other because this film is a little bit different. The difference I think is that this is a lot blacker through here. It's what we call penetration or the amount of x-ray that goes through here. You see quite a bit of whiteness. When I look at this, it's not as white, but it still extends out into this area so that the area I was focusing on before I think is

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

probably not too different, even though the amount of lightness is different. This area is still abnormal, but the x-ray is a little bit different.

Q. So, it's fair to say that you can see the cancer again on February that you saw in January?

A. Correct.

Q. And radiologists at the Metro Clinic diagnosed this film as normal; correct?

A. Normal, in respect -- I think they talked about this abnormality here and some --

Q. The area down here in the costophrenic angle?

A. Correct.

Q. But as far as -- actually, as far as the paratracheal stripe area and the lower tracheal area, that was read as normal; true?

A. True.

Q. There came a time, Doctor, that someone reviewed these x-rays for the third time and compared the -- and actually, reviewed January, February and again in March, didn't they?

A. Right.

Q. And again they were reviewed and --

MR. GAYLORD: Your Honor, I have objection to the relevance on this line.

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

THE COURT: What's the purpose for which this is offered?

MR. SIRRIDGE: I'm going to get to the diagnosis of mucoepidermoid carcinoma which was covered in the direct examination.

THE COURT: Well, he did not make that diagnosis in direct. Link up your question directly to his direct examination.

Just rephrase your question in a way that links it to the direct examination.

MR. SIRRIDGE: Good.

BY MR. SIRRIDGE:

Q. Is this an area, Doctor, in the lower trachea a mucoepidermoid carcinoma can arise and grow?

A. Yes, it can.

Q. And as long as I'm up here, Doctor, isn't this area and isn't this area in the paratracheal area down in the lower trachea isn't it blocked from view in the PA film?

A. I think Dr. Primack was pretty clear about it's an area, a blind area, an area where you look back here. As I described, I looked back here. You can see this being abnormal. You don't see it as clearly on a PA film as you do on a

http://legacy.library.ucsf.edu/tid/szq07a00/pdf Digitized by the Tobacco Industry Documents Library http://industrydocuments.ucsf.edu/docs/jqhl0001

lateral film.
Q. Doctor, that was what Dr. Primack was talking about in terms of radiologists having this blind area in the lower trachea; isn't that right?
A. Correct.
Q. And that may have been a reason why this tumor was missed because that is a blind area for radiologists, isn't it?
A. That's correct.
Q. Thank you. Thank you very much.
Isn't it true, Dr. Keppel, that tumors can go undiagnosed for years when they are located in the lower trachea?
A. I think Dr. Primack had a case, and again that is an individual case, so it's not a review of the subject, but that can occasionally happen.
Q. And in that case he talked about was a mucoepidermoid carcinoma of the lower trachea, wasn't it?
A. Yes, it was.
MR. SIRRIDGE: Your Honor.
THE COURT: Yes.
MR. SIRRIDGE: I don't know what your pleasure is on taking the noon break, but I'm about half way through.

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Internet Archive in 2014 http://www.industrydocuments.ucsf.edu/docs/jqhl0001

THE COURT: Proceed.
BY MR. SIRRIDGE:
Q. I heard your discussion this morning with Mr. Gaylord about the cell type involved in this case.
A. Yes.
Q. And I'm not clear what you are trying to tell the jury. Are you trying to tell them that it is an adenosquamous carcinoma or a squamous carcinoma?
A. I think what I'm saying is in my experience, when you have a cytology that is one way and keratinizing squamous cell of a smaller area of a tumor, which I do regularly with the bronchoscope, that in my experience at times you find when you do a bigger biopsy like surgery or postmortem you can find more areas that tell you what the actual tumor was. And in my experience this kind of presentation with bleeding is often squamous cell carcinoma.
Q. But you're not trying to second guess Dr. Oyama and Dr. Franzini, are you?
A. No. I'm just pointing out the limitation of the procedures and the pathologist's limited tissue that they got.

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

Q. In fact, Doctor, there was no tumor to analyze in this case, was there, by the pathology department?
A. By tumor you mean resected specimen?
Q. Absolutely.
A. There was not.
Q. And how big was the biopsy?
A. As it was written by the pathologist, two or three pieces, it was less than .5 centimeters.
Q. That is fairly small?
A. Yes.
Q. You talked about the cytology of the tumor, Doctor. Isn't it well known that cytology by itself is not a good predictor of cell type?
A. Cytology has more variation, both in terms of inter-observer interpretation, as well as being harder to be specific about.
Q. So, when you say -- I'm sorry.
A. So, the cell type may not be as reproducible.
Q. When you say inter-observer variability, you mean two pathologists can look at the same cells, one can diagnose one type and another pathologist can diagnose another type; is that true?

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Tobacco Industry Documents Library http://industrydocuments.ucsf.edu/docs/jqhl0001

A. That is true.
Q. In fact, Doctor, isn't the cytology of adenosquamous carcinoma an unreliable basis for diagnosis?
A. I don't think you can make adenosquamous based on a cytology. Cytology is a separate bit of information that you have.
Q. Isn't it true that 70 percent of the time cytology cannot show diagnosis of adenosquamous carcinoma to be accurate?
Let me flip that around. I'll phrase it.
A. Yeah.
Q. In only 30 percent of the cases of adenosquamous was the cytology diagnostic? Is that a true statement?
A. That sounds correct.
Q. Now, this was a poorly differentiated carcinoma, wasn't it, Doctor?
A. Yes, sir.
Q. And you're basing that on the pathology report; true?
A. Yes.
Q. And isn't it also true, Doctor, that pathologists often disagree on the diagnosis of poorly differentiated types of lung cancer?

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

A. I think, as I testified earlier, I think they call it undifferentiated. It makes it harder to find the elements of the original cell line.

Q. In over 50 percent of cases, experienced pathologists disagree when they are talking about poorly differentiated carcinomas; isn't that true?

A. That sounds correct, yes.

Q. Doctor, I want to ask you something about the clinical presentation in the case. Wouldn't you agree -- I'll step back for a second. I have a question about your statistics that you were talking to Mr. Gaylord about.

You talked about the fact that you had only seen one mucoepidermoid carcinoma in your series; is that right?

A. There's one report, and I didn't participate in that case.

Q. How many adenosquamous carcinomas in that series of yours of them all?

A. I believe in our group, I can't give you the exact number, it's probably around ten percent, five to ten percent.

Q. But you didn't look, did you?

A. I'm not aware.

Q. You didn't count that number, did you?

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

A. No, I did not.
Q. Tell me, Doctor, how many central, how many central, how many adenosquamous carcinomas in the central portion of the lungs are in your series of 2000 cases?
And by central lung I'm talking right here in the central airway, the base of the trachea.
Tell me, Doctor, how many adenosquamous carcinomas in your series are in that location?
A. I can't tell you that. I didn't get that information teased out from the data.
Q. Isn't it a fact that 90 percent of adenocarcinoma arises in the periphery of the lung, out here in the periphery, and not in the central structures of the lung; isn't that true?
A. I'm not aware of that data.
Q. Well, what date are you aware of with respect to where adenosquamous arises?
A. The ones that are more of the squamous differentiation tend to be more central. The ones that are more of the mucoid differentiation are more peripheral, the more adeno.
Q. But is it your statement that you don't know where adenosquamous arises more, in the

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

periphery or in the central portion of the lung?
A. I would say it's more in the periphery.
Q. Could it be as high as 90 percent in the periphery?
A. Could be.
Q. Can you cite me a single medical source indicating that adenosquamous carcinoma typically arises in the central portion of the lung?
A. I think I would have to say it wouldn't typically arise in the central portion. The larger percent arrive peripherally, and those are the ones that are more of the adeno differentiation.
Q. And what are you relying on for that?
A. My experience.
Q. Can you cite me a single article that the adenosquamous carcinomas that arise centrally are more squamous in component rather than adeno?
A. Not, not a specific article.
Q. So, you would -- now this tumor, you would agree, is located in the lower tracheal area of Mr. Williams; correct?
A. Yes.
Q. That is an area that is far more consistent with mucoepidermoid carcinoma than it is adenosquamous carcinoma; true?

http://legacy.library.ucsf.edu/tid/szq07a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/jqhl0001

A. The total number of tumors arising there that are adenosquamous would be higher. Percentage-wise, it would be more likely the adenosquamous would arise peripherally.

Q. How would you know that, Doctor, since you have never counted the number of peripheral adenocarcinomas?

Excuse me.

How would you know that since you never counted the number of central adenosquamous in your series?

A. The adenosquamous that I diagnosed, some of those have been central. I have never seen a mucoepidermoid. So, in my experience, that would have to be true.

Q. Well, of course. You are aware that the pathology diagnosis of adenosquamous carcinoma and mucoepidermoid carcinoma is very close?

A. Yes. Yes, it is.

Q. It's very hard to distinguish those two tumors, isn't it?

A. I think that just the name implies that they are similar, and that there are adeno and squamous elements in both.

Q. They are both mixed cell type carcinomas;

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Support by http://industrydocuments.ucsf.edu/docs/jqhl0001

isn't that true?
A. That is true.
Q. Can you conceive of a situation where someone diagnoses an adenosquamous carcinoma but that it really is a mucoepidermoid carcinoma?
A. I can conceive of that.
Q. And that might be one reason why you have not seen very many mucoepidermoid carcinomas; isn't that true?
A. I think that, with the large series, you get biopsies similar to what it was in this case, and they haven't read, except for one case, mucoepidermoid.
Q. Well, you just told me that you thought the biopsy was too small in this case; that in your thinking that, if there were more tumor analyzed, you would find a different cell type; isn't that what you told the jury?
A. That is true. But in the cases which we are involved, all of them are, not just some of them postmortem biopsy, some are surgical biopsies. That diagnosis was made only one in 2361 cases.
Q. Well, how many of those were bronchial biopsy cases, of your 2000 cases or 2300, how were bronchial biopsy?

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

A. I would say probably about 40 percent.
Q. Small amount of material; correct?
A. Right.
Q. More difficult diagnosis, that type of cancer, on the small amount of material, versus a resection or an autopsy; isn't that true?
A. Yes.
Q. Also, Doctor, the bronchoscopy that you indicated over here that we talked about, the diagnostic procedure that was done on Mr. Williams, that indicated tumor inside the major airways here at the base of the trachea; didn't it?
A. Well, reading the note from Dr. Turner, he said there was tumor extending into the medial post -- posteromedial portion of the left.
Q. Correct. Down here that area?
A. Down there. And more down into what's called the bronchus intermedius, which is the tube between the trachea and the upper lobe.
Q. Down here?
A. Right.
Q. Okay. And in here? All three locations?
A. All three locations.
Q. Doctor, can you cite me a single medical article that says adenosquamous carcinoma arises

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Internet Archive in 2014 http://www.industrydocuments.ucsf.edu/docs/jqhl0001

inside a major airway?
A. No, I can't.
Q. There were no distant metastasis in this case, were there, Doctor?
A. Reading the reports, they describe the left supraclavicular nodes. By some classification, that's distant from a previsional tumor.
Q. But that is not outside the chest, is it?
A. Correct.
Q. So, even on a TNM system, with the M standing for metastasis, that is a zero, isn't it?
A. That's correct.
Q. That means there is no distant metastasis documented? That is what that means; correct?
A. I believe that the stage 3B is based on the amount of media-carinal tumor, and they were aware at least of the left supraclavicular because they radiated that area to treat the tumor.
Q. Yes. But there was no documented distant metastasis in this case; correct?
A. Correct.
Q. And adenosquamous carcinoma is known for having a very aggressive clinical course, isn't it?
A. Yes, it is.

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Legacy Industry Documents Library - http://industrydocuments.ucsf.edu/docs/jqhl0001

Q. And we just talked about when the tumor was diagnosed over here and you said that it was present on x-ray in January of 1996; correct?
A. Correct.
Q. How long before January of 1996 was it present and capable of being seen on x-ray?
A. Well, there's no x-rays to look at. So you asked me a hypothetical. I don't have those.
Q. It could be for years, couldn't it?
A. Well, I think the course from you take January or whenever the diagnosis in September was one which, if you go back from that course, that it was a rapidly dividing tumor. So that it couldn't have been years, in retrospect, with which it progressed.
Q. Doctor, I know you are not a lung pathologist, but it is true that lung cancer can differentiate over time, isn't that true?
A. Yes, that is true.
Q. In other words, they can become more aggressive looking microscopically at a later time than they were at an earlier time; isn't that true?
A. Yes.
Q. Despite the fact that you can see the tumor on x-ray in January of 1996, in October when

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Internet Archive in 2014 http://www.tobaccoindustrydocuments.ucsf.edu/docs/jqhl0001

they did the actual diagnostic procedures to stage the tumor there was still no distant metastasis; isn't that correct?

A. They did the bronchoscopy. That wasn't the test looking for metastasis. If they did a CAT scan, that would have been the test to look for that. They did not see tumor in the liver or the adrenal gland.

Q. They also did a brain scan, didn't they?

A. Yes.

Q. And that was negative for tumor; correct?

A. That's correct.

Q. So, isn't it true, Doctor, from a clinical perspective, the location of this tumor and the symptoms of this tumor are more consistent with mucoepidermoid carcinoma that they are an adenosquamous carcinoma; isn't that true?

A. I think it's hard to make a generalization out of mucoepidermoid since we don't see many. I think the symptoms are consistent with lung cancer. The course is consistent with any lung cancer.

Q. Doctor, what about tracheal cancer? How many adenosquamous carcinomas of the trachea have you diagnosed that originated in the trachea?

http://legacy.library.ucsf.edu/tid/szq07a00/pdf Courtesy of http://industrydocuments.ucsf.edu/docs/jqhl0001

A. I don't think I have diagnosed that.
Q. But you heard Dr. Primack say that that is where mucoepidermoid carcinoma can begin, in the lower trachea; isn't that true?
A. It can, yes.
MR. SIRRIDGE: No further questions, Your Honor.
THE COURT: Redirect.
MR. GAYLORD: Yes.

REDIRECT EXAMINATION

BY MR. GAYLORD:
Q. Briefly, Doctor. To get to the bronchi in a bronchoscopy procedure, you go through the trachea, don't you?
A. Yes, you do.
Q. So, if there was a mucoepidermoid or any other tumor in the trachea you would see it on your way there?
A. Well, part of your examination starts from the vocal chords down, so that your trachea is part of the examination. Indeed, you have to go through there, but that is part of the direct examination.

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Internet Archive in 2014 http://www.industrydocuments.ucsf.edu/docs/jqhl0001

Q. And this is going to skip around. I got about five questions.

Is there any reason to think that there would be a significant difference in the outcome of this cancer in Jesse Williams if it would have been diagnosed in early 1996 instead of late 1996?

A. I don't think so.

Q. In the practice of pulmonary medicine, do physicians who diagnose and treat lung cancer, in your experience go back and read the Surgeon General's report each time to look at questions like whether this is a disease that is caused by smoking?

A. Not very often.

Q. Do you, as a treating physician in that specialty, keep in mind the general conclusions of the Surgeon General's report and the rest of the literature that answers the question which cancers are caused by smoking?

MR. SIRRIDGE: Objection, Your Honor. That is leading.

THE COURT: It is leading.

BY MR. GAYLORD:

Q. How do you keep track of or know what you know, Doctor, about what cancers are caused by

http://legacy.library.ucsf.edu/tid/szq07a00/pdf Digitized by the Internet Archive in 2014 http://tobaccodocuments.ucsf.edu/docs/jqhl0001

smoking?
A. As I said, I have a clinical practice and I base a lot of my opinions on my experience and my training which occurred here at the University of Oregon.
Q. Is there any doubt that the biopsy and the cytology procedures and the bronchoscopy and the x-rays in Jesse Williams case were adequate procedures for purposes of diagnosing him with lung cancer and undertaking treatment?
A. Yes, I think they were adequate procedures.
Q. The pathologists involved in Jesse Williams' case found squamous cell in the brushings; is that correct?
MR. SIRRIDGE: Again, Your Honor, leading.
THE COURT: Yes. This isn't controversial. This particular point I don't think was disputed.
MR. GAYLORD: I'm trying to preface it, if I may. Thank you.
BY MR. GAYLORD:
Q. Did they find a squamous cell or squamous cells in the brushings and did they find

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Internet Archive in 2014 http://www.tobaccoindustrydocuments.ucsf.edu/docs/jqhl0001

indications of both the adenosquamous type of cells under the microscope from the biopsy?

A. Yes, they did.

Q. And is there any indication that they found in the cytology any cells that would justify a diagnosis of mucoepidermoid cancer?

A. No, there is not.

MR. GAYLORD: Thank you.

THE COURT: Thank you, Doctor. You may step down.

Can Plaintiffs be ready to proceed at 1:30 with the next evidence, whatever that may be?

MR. GAYLORD: I believe we can. We are going to have discussion with the Court about preparation of some of the evidence.

THE COURT: So, 1:30, jurors. Notes here. Don't discuss the case yet. Watch your step. See you at 1:30.

Is there anything first for the record?

MR. GAYLORD: Not here, Your Honor.

MR. SIRRIDGE: Nothing, Your Honor.

THE COURT: All right.

We'll go off the record.

* * *

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Internet Archive in 2014 http://www.industrydocuments.ucsf.edu/docs/jqhl0001

THE COURT: All right. We are back on the record at Mr. Dumas's request.

MR. DUMAS: Thank you, Your Honor.

Very briefly, Dr. McAfee, an addiction witness. We asked Plaintiff's counsel yesterday for a list of the rebuttal witnesses. We were given a list. There was no Dr. McAfee, and there was no addiction witness on that list. So I was quite surprised to hear that.

MR. GAYLORD: We told counsel last night that we were trying to reach witnesses, and the list we gave them was all we knew at the time. It was very carefully put that way, and they knew we might have other witnesses.

THE COURT: Is there something you want me to do? Is there something you are asking me to do? Is there information you are wanting from them that you're asking --

MR. SIRRIDGE: I'm sorry.

I would certainly ask for a CV and some sort of background on this gentleman who is now supposed to appear today. I know who Dr. Hammer is.

THE COURT: Anything else from anybody?

Okay. Well, to the extent you have

http://legacy.library.ucsf.edu/tid/szq07a00/pdf Courtesy of http://industrydocuments.ucsf.edu/docs/jqhl0001

witnesses you are going to call, you need to identify them to the opposing party, as we have been, and get Mr. Sirridge what you have on the doctor in terms of CV and so forth as quickly as you can.

MR. GAYLORD: I don't know if we have one or not.

THE COURT: As quickly as you can is what I said.

MR. THOMAS: We will.

THE COURT: All right.

Anything else for the record part right now?

MR. SIRRIDGE: No, thank you, Your Honor.

THE COURT: Okay.

Now we are really off the record.

* * *

(Whereupon, the a.m. proceedings adjourned.)

* * *

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Tobacco Industry Documents Library at http://industrydocuments.ucsf.edu/docs/jqhl0001

STATE OF OREGON)
) SS.
County of Multnomah)

I, Jennifer Wiles, hereby certify that I am an Official Court Reporter to the Circuit Court of the State of Oregon for Multnomah County; that I reported in Stenotype the foregoing proceedings and subsequently transcribed my said shorthand notes into the typewritten transcript, pages 1 through 99, both inclusive; that the said transcript constitutes a full, true and accurate record of the proceedings, as requested, to the best of my knowledge, ability and belief.

Dated this 15th day of July, 1999 at Portland, Oregon.

_____
Jennifer Wiles
Official Court Reporter

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Digitized by the Tobacco Industry Documents Library http://industrydocuments.ucsf.edu/docs/jqhl0001

http://legacy.library.ucsf.edu/tid/szq07a00/pdf
Downloaded from https://www.industrydocuments.ucsf.edu/docs/jqhl0001